JD(ATL)–48–04
Birmingham, AL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

UNITED STEELWORKERS OF AMERICA, AFL–CIO, CLC and UNITED STEELWORKERS OF AMERICA, LOCAL UNION 224 (Citation Corporation)

and **CASE 26–CB–4417**

JOEL PRINCE, an Individual

Michael Jeannette, Esq.,
for the General Counsel.
Joel Prince,
for the Charging Party.
George Barrett, Esq.
(Barrett, Johnston & Parsley),
of Nashville, TN, for the Respondent.

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on July 12, 2004 and August 12, 2004 in Nashville, Tennessee. After the parties rested, I heard oral argument, and on August 13, 2004, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] Because of the unusual facts, some further discussion may be warranted.

Further Discussion

The facts, set forth more fully in the attached bench decision, may be summarized as follows. United Steelworkers of America and its Local 224 (the "Respondent" or the "Union")

[1] The bench decision appears in uncorrected form at pages 402 through 418 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

represented a unit of production and maintenance employees at a facility operated by Citation Corporation (the "Employer") in Camden, Tennessee. The Employer shut down this facility. To dismantle and move out the equipment, it recalled some of its employees and also used an outside contractor.

The Union filed a grievance which went to arbitration. The arbitrator determined that the Employer should have used 8 employees it had not recalled to help dismantle the equipment. The arbitrator did not identify these employees by name, but only as "the 8 next senior maintenance employees who also have experience in moving/loading large equipment."

The Union undertook to select these 8 employees but did not follow the arbitrator's instructions to the letter. Instead of selecting 8 employees from the maintenance department, it picked 7 maintenance employees and one laboratory employee. The Charging Party, believing that he should have been recalled rather than the laboratory employee, filed the charge which began this proceeding. The General Counsel alleges that the Union passed over the Charging Party in favor of the laboratory employee because the Charging Party was not a Union member.

Certain facts raise suspicions that Respondent based its selection process partly on Union membership. The laboratory employee chosen, Carey, was a Union member, but Charging Party was not. Although Carey had many years experience in the maintenance department, he was not a maintenance employee at the time the Union selected him to receive pay. If the arbitrator's instructions specified employees working in the maintenance department at the time the disputed work was performed, rather than employees with maintenance department experience, Carey would fall outside the list of eligibles.

To prove unlawful motivation, the General Counsel offered the testimony of a witness, Smith, concerning his conversation with a Union official, Higdon. For reasons discussed in the bench decision, I did not credit this testimony. Without this testimony, the government's proof was insufficient, I concluded, to establish that the Union acted with unlawful motivation.

The Union's Duty

Clearly, when a union undertakes to distribute money arising out of an arbitral award, it owes a legal duty to the employees in the bargaining unit it represents. However, the exact nature of this duty may depend on specific circumstances.

In one possible situation, an employer pays the award money directly to the union, which then distributes it. The money arising from an arbitral award clearly is intended to make certain employees whole for a breach of the collective–bargaining agreement. Obviously, it would be improper, and unlawful, for a union simply to pocket this money for the union's own use. ***United Mine Workers of America, District 5, and its Local 1378, AFL–CIO (Pennsylvania Mines Corporation),*** 317 NLRB 663 (1995).

However, I need not discuss the extent to which a union that actually receives the award payment is a fiduciary or trustee because in this case, the Union did not receive the money. Here, Union officials simply gave the Employer a list of names of employees to receive the payments and the Employer sent checks to these individuals. There is no obvious difference

between this action, sending a letter to the Employer, and the Union's other communications with the Employer on behalf of bargaining unit employees. Therefore, I conclude that the Union's duty in this instance is the same one it generally must fulfill in representing the bargaining unit.

In performing its representation function, a union has a duty not to engage in conduct which is arbitrary, discriminatory or in bad faith. A breach of this duty violates Section 8(b)(1)(A) of the Act. ***Unlicensed Division, District 1 (Mormac Marine Transport)*** 312 NLRB 944 (1993). However, negligent actions or inactions by a union do not alone constitute a breach of the union's duty of fair representation. ***Graphic Communications Local 4 (San Francisco Newspaper Printing Co.),*** 249 NLRB 88 (1980).

A union also may not cause an employer to discriminate against an employee in violation of Section 8(a)(3) of the Act. Causing such discrimination violates Section 8(b)(2). Thus, when a union steward caused an employer not to assign overtime to an individual because that person was not a union member, the union violated Section 8(b)(2) and, derivatively, Section 8(b)(1)(A). ***Branch 3126, National Association of Letter Carriers, AFL–CIO (United States Postal Service),*** 330 NLRB 587 (2000).

The Union's Conduct

A representative of the International Union, together with the Local's president and vice president, decided which 8 employees should receive payments pursuant to the arbitrator's award and then the international representative sent these names to the Employer. The General Counsel argues that this selection process was subjective rather than objective, and to support this argument cites the testimony of Union Vice President Steven Dowdy.

Dowdy testified that the three Union officials "picked who we felt was the most eight senior experienced people" and put those names on the list sent to the Employer. The General Counsel contends that this testimony shows that the selection process was subjective.

The General Counsel's argument rests on the assumption that if the process had been totally objective, Dowdy would have used a word such as "determined" rather than "felt." However, I do not ascribe such significance to the word "felt."

Certainly, a lawyer might have employed a more objective–sounding synonym – a word such as "decided," "ascertained," or "identified" or perhaps (being the choice of a lawyer) all three – but Dowdy was not an attorney. He was a lay witness testifying without benefit of thesaurus. At times his grammar was casual, and so was his choice of words.

Although I reject the General Counsel's argument that Dowdy's testimony establishes subjectivity, some other circumstances do concern me. The arbitrator's instructions are so clear that, on first impression, they appear to allow only one logical interpretation, yet the Union read them quite differently. Moreover, the Union's interpretation appears to be at odds with the relief the Union had sought in the grievance itself.

According to the arbitral award, the Union had asked "for the 10 most senior qualified *maintenance* people to be paid for the time contractors were working. . ." (Italics added.) Thus, it would appear that when the Union pressed the grievance to arbitration, it wanted the Employer to make payments to maintenance department employees.

The arbitrator agreed with the Union in principle, but ordered backpay for 8 maintenance employees rather than 10. Specifically, the arbitral award concluded that "the 8 next senior maintenance employees who also have experience in moving/loading large equipment. . .should have been offered this work opportunity and are entitled to relief."

On its face, this language plainly indicates that the employees selected should be maintenance employees, as the Union apparently had advocated before the arbitrator. Yet the Union officials picked Carey to be one of the 8 recipients, and Carey had not worked in the maintenance department for more than 5 years.

In this context, the Union's selection of Carey raises serious questions. If other credited evidence pointed to an unlawful motive, I would not hesitate to find that a preponderance of the evidence supported the General Counsel's theory. Absent such evidence, the record leaves me with only a suspicion, and a suspicion, however strong, is not a preponderance.

Moreover, the Union offered a somewhat plausible explanation for its decision to put Carey on the list rather than the Charging Party. The arbitrator held that the Employer should pay "the 8 next senior maintenance employees who also have experience moving/loading large equipment." The Union interpreted the term "maintenance employee" to include employees like Carey with previous experience working in the maintenance department. Such an interpretation was consistent with the past practice of using plant wide seniority to determine the order of layoffs and recalls.

I examine the Union's reasoning for very limited purposes: To determine whether the stated reasons are pretextual (which would suggest an unlawful motivation), to decide whether there has been negligence, and if so, whether that negligence rises to the level of a breach of the duty of fair representation. Thus, I do not judge whether the Union's reasoning was "correct" according to some outside standard.

The Union's reasons are not pretextual on their face, and the record does not otherwise reveal them to be pretextual. I conclude that they are not. Accordingly, and for the reasons stated in the bench decision, I further conclude that Respondent has not violated Section 8(b)(2) of the Act.

The Union's interpretation of "maintenance employee" to mean "an employee with experience in the maintenance department" is not so far–fetched as to be negligent. In other words, reasonable people, accustomed to resolving issues on the basis of plant wide seniority, might reach such a conclusion.

As discussed above, ordinary negligence alone does not breach the duty of fair representation. In this case, the record does not support a finding of any negligence, even the ordinary kind. Therefore, it follows that there was no out–of–the–ordinary negligence which

would breach the Union's duty of fair representation. For this reason, and for the reasons discussed in the bench decision, I conclude that the Union did not violate Section 8(b)(1)(A) of the Act.

CONCLUSIONS OF LAW

1. The Employer, Citation Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO and its Local 224 (collectively called Respondent) are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Complaint is dismissed.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

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This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The Complaint alleges that Respondent violated Section 8(b)(1)(A) and Section 8(b)(2) of the Act. Finding insufficient evidence of motivation, I recommend that the Board dismiss the Complaint entirely.

Procedural History

This case began on February 23, 2004, when the Charging Party filed his initial charge in this proceeding. He amended it on April 28, 2004. On April 30, 2004, after investigation of the charge, the Regional Director for Region 26 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

On July 12, 2004, hearing opened before me in Nashville, Tennessee. On July 13, 2004, because one of the attorneys was ill, I adjourned the hearing until August 12, 2004. On that date, the parties completed the presentation of evidence and counsel then presented oral argument.

Today, August 13, 2004, I am issuing this bench decision.

Overview

In very general terms, the facts may be summarized as follows. The Charging Party, Joel Prince, worked in the maintenance department of the Employer's facility in Camden, Tennessee. He was a member of the production and maintenance unit represented by United Steelworkers of America and its Local 224 but was not a union member.

Under state law, made enforceable by Section 14(b) of the Act, no collective–bargaining agreement could require employees in this unit to become union members, or pay dues, as a condition of employment. Even though Prince had been president of Local 224 some years ago, he had dropped his union membership and was not paying dues at any time material to the Complaint.

On December 9, 2002, the Employer's general manager sent International Representative Tommy Powell a letter announcing that it would be closing the Camden, Tennessee facility. The letter continued, "We expect to have completed all manufacturing by December 20, 2002."

After the plant closure, an employee discovered that the Employer had retained an outside contractor to dismantle the machinery to be removed from the plant. Under the collective–bargaining agreement, the Employer should have used bargaining unit employees to perform this work.

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A grievance resulted which reached arbitration in late May 2003. The arbitrator issued an award about 3 months later, finding a breach of the collective–bargaining agreement. To remedy this breach, the arbitrator stated, in the Analysis Section of his decision, that "the 8 next senior maintenance employees who also have experience in moving/loading large equipment" receive a payment from the Employer.

The arbitrator's award did not name the 8 workers to be paid, but instead directed that the "harmed employees are to be identified and compensated as set out in the Analysis within 30 days of receipt of this Decision and Award."

After receiving this decision, International Representative Powell contacted the president and vice president of Local 224 and scheduled a meeting. At this meeting, the three officials decided which 8 of the bargaining unit members should receive pay.

International Representative Powell then sent a letter to the Employer, stating "here are the eight employees that are entitled to the pay." The letter listed 8 names, but the Charging Party's name was not one of them. The Employer paid the employees on the list, but not the Charging Party.

The parties agree that seven of the eight listed employees should have received the pay. They disagree about the person listed first: Ed Carey. Although Carey was in the bargaining unit when the plant closed, he worked in the lab section rather than in the maintenance department. Additionally, in August 2003, a Social Security judge found that Carey had become disabled, and therefore unable to work, as of December 6, 2002.

The government contends that Carey did not meet the criteria specified by the arbitrator and therefore should not have been selected. Instead, the General Counsel argues, the Union officials should have put the Charging Party's name on the list.

The Complaint alleges that the Union officials did not choose the Charging Party to receive the pay because he was no longer a Union member and did not pay dues. According to the General Counsel, the action of the Union officials breached the Union's duty to represent all members of the bargaining unit fairly and therefore violated Section 8(b)(1)(A) of the Act. Additionally, the government contends that by keeping the Charging Party's name off the list which Powell sent to the Company, the Union caused the Employer to discriminate. In this manner, the Complaint alleges, the Union also violated Section 8(b)(2) of the Act.

Before addressing these allegations, I will turn first to some preliminary matters.

Identity of Respondent

The Complaint identified as the Respondent "United Steelworkers of America, AFL–CIO, CLC and its Local 224." By using the singular terms "Respondent" and "Union," rather than "Respondents" and "Unions," the Complaint suggests that the International Union and Local 224 together form a single entity. Thus, Complaint paragraph 5 alleges that at "all

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material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act."

The International Union and Local 224 filed a single "Consolidated Answer" which distinguishes between the International and the Local. This "Answer" gives the following response to Complaint paragraph 5:

> In answering paragraph 5 of the Complaint, Respondents state that the term "Union" is defined nowhere on the face of the Complaint and deny that they are a single labor organization. Further answering paragraph 5 of the Complaint, Respondents admit that both the International Union and the Local Union are labor organizations within the meaning of Section 2(5) of the Act.

The International and Local also contend that the Complaint should be dismissed to the extent that it alleges a violation by the International Union. Therefore, it is important to determine the relationship of the International and the Local.

Counsel entered into a written stipulation, introduced as Joint Exhibit 8, which states in part as follows:

> The United Steel Workers of America (AFL–CIO), CLC and its Local 224 ("Union") had a collective bargaining agreement with the Employer effective March 26, 1999, and terminated February 28, 2003 (Exhibit J.T. 1).

The first paragraph of this collective bargaining agreement identifies itself as an "agreement between Citation Corporation's Division: Camden Casting Center (the "Employer") and "the United Steel Workers of America, AFL–CIO, CLC, *on behalf of Local Union No. 224*, hereinafter call[ed] the 'Union.'" (Joint Exhibit 1; italics added.)

This language, that the International Union acted "on behalf of" the Local when it entered into the collective bargaining agreement, suggests that the International Union acted as the agent of the Local Union. However, I do not conclude that the Local Union was the principal and that the International was its agent in a common law agency relationship.

Not infrequently in labor relations, when both an international union and one of its locals deal with an employer about a particular bargaining unit, the local union is serving as the agent of the international, rather than vice versa. Moreover, the Consolidated Answer admits that the international union is the exclusive representative of the bargaining unit described in Complaint paragraph 7, but denies that the local union is the exclusive representative.

Additionally, in response to Complaint paragraph 8, the Consolidated Answer admits "that the International Union and Citation Corporation have maintained and enforced a collective–bargaining agreement covering the conditions of employment of the Union and containing, among other provisions, a grievance and arbitration provision." Thus, the Consolidated Answer clearly indicates that the international union, not Local 224, serves as the exclusive bargaining representative.

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Therefore, I do not conclude that the "on behalf of Local 224" language in the collective–bargaining agreement signifies that the international is the agent of the local union. To the contrary, and consistent with the Consolidated Answer's denial that Local 224 is the exclusive representative, I find that the International Union is the exclusive bargaining representative of the bargaining unit described in Complaint paragraph 7. Moreover, I conclude that Local Union 224 has served as the international union's agent in administering the collective–bargaining agreement.

In this decision, I will use the term "International Union" to refer to United Steel Workers of America, AFL–CIO, CLC and the term "Local Union" to refer to its Local 224. When the word "Union" appears without a modifier, it will refer to both the International Union and Local Union, as will the word "Respondent."

Motion to Dismiss

Respondent raised four affirmative defenses in the Consolidated Answer, and later amended this Answer to raise four more. One of these affirmative defenses states as follows:

> The International should be dismissed as a party on the basis that there are no allegations of any matter of conduct by the International in the Complaint, which would violate the Complainant's rights under the National Labor Relations Act. Therefore, the International Union should be dismissed as a party.

Additionally, at hearing, Respondent moved to dismiss the International Union. Respondent's counsel argued, in part that the International "should be dismissed on the basis that this, number one, no allegations that they engaged in any conduct."

Although the Complaint does not specifically plead that the International and the Local are a single entity, it does name both in the caption and uses the term "Respondent" to refer to the International and Local together. Therefore, Respondent's counsel errs in arguing that there are "no allegations that [the International] engaged in any [unlawful] conduct."

Respondent's counsel further argues that "to hold the international responsible for a" breach of the duty of fair representation, "you've got to show some nexus, not merely the action of the international representative who acts in a dual capacity as an advisor and a representative of the local in relation to the employer."

Notwithstanding this argument, Respondent's Consolidated Answer denied that the Local Union was the exclusive representative of the bargaining unit and instead asserted that the International Union was the representative. This admission that the International is the exclusive bargaining representative demonstrates a significant nexus between the International and the alleged breach of the duty of fair representation.

Indeed, before there can be any breach of the duty of fair representation, that duty must exist in the first place. Only the exclusive representative owes a duty to the employees in the

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bargaining unit represented. A union cannot admit that it is the exclusive bargaining representative without also admitting, by implication, that it owes a duty to the employees in the unit it exclusively represents.

The Union's International Representative, Tommy Powell, appeared before the arbitrator as the Union's representative. After the arbitrator issued the award, Powell contacted Local 224's president and vice president and set up a meeting to discuss implementing the arbitrator's award. The international representative then met with the two Local Union officials and decided which employees would get the benefits of the arbitrator's award.

Clearly, the International Union took the leading role in the actions which are at issue here. Therefore, I deny the motion to dismiss the International Union from this proceeding.

Undisputed Allegations

In its Consolidated Answer, Respondent has admitted all of the allegations raised in Complaint paragraphs 1(a), 1(b), 2, 3(a), 3(b), 4, and 9(b) and some of the allegations raised in Complaint paragraphs 4, 7, 8, 9(a), 9(b), 9(c), 9(d) and 9(e). Respondent also has stipulated certain facts. Based upon these admissions and stipulations, I make the following findings.

The Charging Party filed and served the initial charge in this proceeding on February 23, 2004, and filed the amended charge on April 28, 2004. The amended charge was served on Respondent by certified mail concurrently with the Complaint and Notice of Hearing.

Citation Corporation, which I will refer to as the "Employer" or the "Company," is a corporation with headquarters in Birmingham, Alabama and manufacturing facilities throughout Alabama, herein called the Company facilities, as well as other states, and it is engaged in casting and forging metal components. Until about January 2003, the Company operated a manufacturing facility in Camden, Tennessee.

The Employer meets the Board's standards for assertion of jurisdiction, and at all material times has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

Both the International Union and the Local Union are labor organizations within the meaning of Section 2(5) of the Act.

At all material times, Tommy Powell, an international representative, has been an agent of the International Union within the meaning of Section 2(13) of the Act.

At all material times, Local Union President Larry Kirk, Local Union Vice President Steve Dowdy and Local Union Financial Secretary Chris Higdon have been agents of the Local Union within the meaning of Section 2(13) of the Act.

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In view of my finding that Local 224 served as the International Union's agent in administering the collective–bargaining agreement, I must also conclude that Larry Kirk, Steve Dowdy and Chris Higdon are agents of the International Union, at least when representing the employees in the bargaining unit described in Complaint paragraph 7. As agents of an agent of the International Union, they exercised authority on behalf of the International in their dealings with the Employer concerning bargaining unit employees.

The parties stipulated that about December 9, 2002, the Employer issued a notice that it would be closing the Camden facility on December 20, 2002. This plant closing would result in the termination of employment of all members of the bargaining unit.

On January 30, 2003, the Local Union filed a grievance alleging that the Company had employed outside contractors to perform work that laid–off Unit employees could have performed. An arbitrator heard this grievance on May 30, 2003, and issued a decision dated August 28, 2003.

The "Overview" above slightly oversimplified the details of this arbitral award. To understand the arbitrator's decision more fully will require somewhat more detail.

In addition to hiring outside contractors to dismantle its machinery, the Employer also called in 8 senior maintenance employees, who worked during the shutdown period. However, it appears that these were not the employees who should have been called in to work under the collective–bargaining agreement.

The Union filed a grievance on behalf of the employees who *should* have been called in to work. The Employer settled the grievance and paid those employees for the time they should have (but did not) work.

However, this grievance did not tie up all the loose ends. The arbitrator decided that 8 more people should receive pay because the Employer did not afford them an opportunity to work. In the Analysis section of his award, the arbitrator wrote, in part, as follows:

> The Union is asking for the 10 most senior qualified maintenance people to be paid for the time contractors were working for the Company. . .The weight of evidence indicates that by the labor agreement and past practice of its implementation, 8 Union workers should have been given the opportunity to perform work that was contracted.

The arbitrator concluded that there was no evidence to establish that the Employer would have offered this work to the 8 employees who received pay under the grievance settlement. Therefore, he decided that another 8 employees should receive the pay. He wrote:

> Therefore, the 8 next senior maintenance employees who also have experience in moving/loading large equipment as testified to by the Union witnesses here should have been offered this work opportunity and are entitled to relief.

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The arbitrator then directed that the "harmed employees are to be identified and compensated. . ."

Complaint paragraph 9(d) alleges that "on September 5, 2003, the Respondent provided the Company with a list of eight employees and requested that the Company pay those employees pursuant to the arbitrator's award." The Union does not admit all of this allegation, but instead stated in the Consolidated Answer, "Respondents admit that the Local Union furnished the Company with a listing of eight employees to be paid pursuant to Arbitrator Furman's Decision and Award. Respondents deny any and all other allegations set forth at paragraph 9(d)."

Actually, Respondent's Answer appears to be in error on this point. The parties have introduced by stipulation, as Joint Exhibit 6, a September 5, 2003 letter from Tommy Powell, who is an *International* representative, not a Local Union official. This letter listed the following individuals as "entitled to the pay":

1.	Ed Carey	5.	Tom Ridley
2.	Howard Melton	6.	Vernon Higdon
3.	Carl Smith	7.	Gary Patterson
4.	David Love	8.	Lowell Wheatly

The General Counsel does not dispute that names 2 through 8 are correctly listed. However, the General Counsel asserts that the first individual, Ed Carey, should not have been listed, and that instead the Charging Party's name should have appeared.

Disputed Allegations

The Complaint alleges two different kinds of unfair labor practices. The first is a breach of the duty of fair representation in violation of Section 8(b)(1)(A). To establish such a violation, the government must prove either that the Union acted with an improper motive or that it acted with more than "mere negligence" when it failed to put the Charging Party's name on the list.

In the present case, the General Counsel does not contend that Respondent was negligent but instead asserts that Respondent took action against the Charging Party because he neither belonged to the Union nor paid dues. Therefore, I will not analyze the facts under a "more than mere negligence" theory.

The Complaint also alleges that by failing to put the Charging Party's name on the list sent to the Employer, the Union caused the Employer to discriminate against the Charging Party in violation of Section 8(a)(3) of the Act, which prohibits discrimination by employers to discourage or encourage union membership. When a union causes such discrimination, it violates Section 8(b)(2).

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The government relies upon the testimony of Carl Smith, one of the 8 employees appearing on the Union's September 5, 2003 list. Smith testified that in December 2003, he ran into Local 224's financial secretary, Chris Higdon, at a Wal–Mart.

According to Smith, Higdon told him that certain employees had received the money from the grievance "and one certain person didn't receive it." Smith said that Higdon did not identify this person. Smith also gave the following testimony:

> Q. What if anything was said during this conversation about anyone not being in the union?
>
> * * *
>
> A. No. Sir. There was nothing said of that.

Later, the General Counsel refreshed Smith's recollection with his affidavit and then elicited this testimony:

> Q. Now, during your conversation with Mr. Chris Higdon, what if anything was said about anyone not being in the union?
>
> A. Yes. He said one certain person was not in the union.

I do not credit this testimony, in part because it conflicts directly with Smith's earlier testimony. Additionally, it is rather vague and makes sense only in the context of Smith's earlier testimony, which it contradicts.

The government tried to bolster Smith's credibility by recalling Charging Party Prince and eliciting testimony about a later conversation that Smith had with Prince. The General Counsel's argument appears to be that if Smith said essentially the same thing to Prince as he stated in his testimony (after his memory was refreshed), then that version is more likely to be correct.

Respondent objected to Prince's testimony, arguing that whatever Smith told Prince should be excluded as hearsay. The General Counsel replied that in Board proceedings, hearsay could be admitted if it corroborated earlier testimony. I allowed the testimony subject to motion to strike.

Although I deny the Respondent's motion to strike Prince's testimony, I accord this testimony very little weight because I do not trust its reliability. While testifying, Smith appeared to have a rather taciturn personality, in contrast to Prince's more loquacious nature. However, the Carl Smith described in Prince's testimony sounded about as talkative as Prince himself.

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Prince attributed to Smith words and ideas which seemed to go well beyond Smith's own testimony. I could not tell how many of these words were Smith's, and how many were Prince's interpolations. Even assuming that Prince's testimony properly could be called "corroboration," it was unconvincing.

On the witness stand, Higdon did not deny telling Smith that "one certain person was not in the union." However, Higdon testified before Smith and no one specifically asked him about this matter. Therefore, I do not conclude that Higdon's silence signified agreement. Additionally, Higdon's pretrial affidavit, which is in evidence, *does* deny that he made such a statement.

Further, Higdon was not one of the Union officials who decided who should be on the list. He did not attend that meeting. Therefore, it seems rather improbable that he should make the comment attributed to him. I find that he did not make this comment.

Apart from this comment which Smith attributed to Higdon, there is no evidence of improper motive. The General Counsel's argument about the Union's motivation seemed fully plausible and, I suspect, it may be correct. However, I cannot rely upon a plausible argument as a substitute for evidence.

In the absence of evidence establishing an unlawful motivation, I do not find that Respondent violated either Section 8(b)(1)(A) or 8(b)(2). Therefore, I recommend that the Board dismiss the Complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout the hearing, counsel impressed me with their civility and professionalism, which I appreciate. The hearing is closed.